NOTES AND SUGGESTIONS

PRIVATE JURISDICTION IN ENGLAND:[1] A THEORETICAL RECONSTRUCTION

THE discussion of private jurisdiction in England has always suffered from a peculiar dislocation of the connection between general principles and particular facts. No matter how clearly any scholar has seen and stated the larger distinctions which mark off one kind of private jurisdiction from another, when he begins to consider special cases these distinctions seem to be more or less completely forgotten. The confusion, which undoubtedly exists in the surface appearance of the facts, becomes a confusion of ideas and language which is a good deal more real. It is impossible that our knowledge of the subject should be materially advanced until these distinctions are put in such form that they can be consistently applied to the mixture of facts which we must study. It is only then that we can hope to discover the method and character of the mixture and the reasons for it.

It is not necessary to distinguish here again the three kinds of private jurisdiction from one another and to restate the characteristics of each. It has been done several times and satisfactorily. An especially good statement is that by Professor Vinogradoff in *The Growth of the Manor* (pp. 362–365) because it describes each jurisdiction in its relation to the manor but without confusion. It should be noticed that the statement is not historical, but as it were a cross-section at some given date, and a date necessarily somewhat late in feudal history, but it is I think accurate in all descriptive particulars. A briefer statement may be found in Maitland, *Select Pleas in Manorial Courts* (p. xvi) but the discussion which follows is less satisfactory. In Professor F. J. C. Hearnshaw's *Leet Jurisdiction in England* (p. 76 ff.) the distinctions are clearly stated and I believe they are accurately applied throughout the book, wherever there is occasion, but the accompanying historical statements must be understood only of times later than the thirteenth century. Inci-

[1] The following suggestions are based upon a study of the subject during several years in my historical seminary and upon the collection of facts made by Mr. W. O. Ault of Boston University for his doctoral dissertation on private courts in England. The present attempt is rather to set forth a programme of study than to state results that can be considered definitive.

dentally in the following paragraphs, the distinctions will be sufficiently stated for the present purpose.

One of the chief causes of our confusion of mind has been the matter of terminology. It has seemed natural to us to apply certain words to the courts as we find them: feudal, manorial, seigniorial. But these terms have in other connections such broad and differing definitions, but so familiar, or in their use in this subject itself have been so variously applied, that they serve at once to obscure the fundamental distinctions. "Feudal" is a tempting term, but it is too vague and general, and to many minds, and not merely of readers but of writers, it helps to keep up the confusion, fatal to so many things, between the sphere of a serf who is the customary tenant of a manor and that of the vassal who is in strict feudal language a baron, whatever may be his rank or the size of his holding. "Manorial" has led to a still more paralyzing confusion because without doubt every form of private jurisdiction has been much of the time connected with and exercised through the court of a manor. In practice indeed this term has led to the most extensive confusion and to statements that would be astonishing if one did not understand the derangement of ideas responsible for them. The first step out of our difficulties must be the abandonment of our old terminology and the adoption of new designations which we may hope to keep free from confusion, and if possible those that will themselves indicate their meaning.

One cannot hope to get three terms that have never been used, but only terms that carry no history of confusion and which express with some clearness their meaning and limits. Describing the courts in the order of dignity and as if they were entirely independent of one another, the following is what I would propose as a theoretical reconstruction of the system of private courts and jurisdictions of the twelfth and early thirteenth centuries.

I. *Baronial.* Some French scholars use the term vassallic for this jurisdiction and the term would be a good one, if we could keep the fact entirely clear in our minds that serfs were never vassals. The only objection to the term baronial is the existence of the later court baron, but this is not a serious objection because the court baron is the court into which the baronial court declines when feudal jurisdiction proper disappears, in other words when the larger part of the original baronial jurisdiction has been absorbed by the state through the development of the common law courts. This jurisdiction is that which a lord has over his vassals, that is, over his *barones,* the term which was often used for rear vassals

in this connection in England and all feudal states. It was primarily a civil jurisdiction only. It dealt with questions concerning the fiefs held of the lord and the services by which they were held. Disputes concerning inheritance, boundary lines, amount and kind of service, the right to pay homage, those involving questions of possession, title, and *jus,* the transfer of lands, and all questions covered by writs of right sent to the lord and by praecipe writs, are typical cases in these courts. They have also a quasi-criminal side in questions of forfeiture and felony in the feudal sense, but no matter of public criminal offense belongs normally in them. In England the common freeman who does not hold by a military tenure, that is, who is not technically a vassal, gets drawn into these courts, probably because of his political importance in the county courts which makes him unwilling to submit himself in every respect to the manorial (domanial) court, and also very possibly because he holds land of the lord by a tenure into which comparatively slight, or no, economic features enter. Here is, however, a subject for investigation: the reason for the place of the common, non-military free tenant in the baronial court where normally he does not belong.

Of these courts we have very few rolls, probably because they were in rapid decline when the practice of keeping rolls became common. Those we have show that their machinery was not commonly employed for any purpose not their own, but that in occasional instances it was so employed. We get many glimpses of them in charters which must be used to supplement the rolls, especially the charters of the twelfth century when rolls were not kept. The age of their great importance was the twelfth century, and by the middle of the thirteenth their decline was well under way. They never had the importance in England that they had on the Continent, probably because the royal judicial system, the king's local courts and writ and inquest processes, were developed so early, from the date of the Conquest almost, and carried into every locality, evoking from the beginning of Anglo-Norman history many cases from these courts. When the royal system was further developed and strengthened by Henry II. the death-blow was given to this jurisdiction. *Quia Emptores* finished it. It survived in the court baron but as only the shadow of its former self, occupied with the business of common freemen; vassals seem practically to have disappeared as rear vassals. As court baron it is closely associated with the manor (domanial) court, with which very likely from the beginning the baronial court had been in many cases associated.

II. *Franchisal.* The jurisdiction which was created by a franchise. (Maitland, *Domesday and Beyond,* p. 80.) It was asserted for the king in the thirteenth century that this jurisdiction must always go back to the grant of a franchise. Historically this was probably not true, but theoretically it was. It was public jurisdiction in private hands, normally the hundred court, but sometimes the court of only a fraction of the hundred cut out from the rest, when a franchise covered only a manor or some other portion of a hundred. The grants of franchise varied in extent, but taken together they included a rather long list of functions belonging to the state, such for example as the view of the frankpledge, the trial of pleas of the crown, the return of writs and the execution of all royal processes, and the imprisonment and hanging of criminals. Both civil and criminal jurisdiction were included, as far as that of the hundred court extended, and the public officers were shut out as from the Continental immunity. In practice this court was sometimes held by itself, possibly it was usually so held when the whole hundred belonged to the lord of the franchise, but it was often held in connection with a domanial court, probably always when the franchise covered only the manor. The rolls of the manor court in this case often indicate distinctly the two kinds of business, but often also the machinery of one court was used to do the business of the other.

III. *Domanial.* This is of course the manorial proper, and it ought to have that name, but so much confusion has been created by the indiscriminate use of the word that it cannot be used now without danger of being misunderstood. It has been used, and used quite commonly, for all three kinds of courts, because they all at times happen to be held with a manor as their territorial unit, and many things have in consequence been said of manor courts which are not at all true of the domanial court. They may very properly be called domanial courts because the lord to whom the court belonged was always the lord who held the manor in domain, and because the court dealt with the concerns of the manor as a domain manor, that is primarily as economic interest. It was the court of the tenants of the manor, bond and free, but not as being bond or free. Status had nothing to do with their relation to the court. Freemen help to compose it because they are tenants of the manor, just as serfs do, and free and serfs are peers of one another in the court. Occasionally a freeman may owe no suit to the domanial court, but it seems to be because his holding does not stand in intimate relation to the manor, but there are many exceptions on the

other side, of freemen seeming not to be in such relations who do owe suit, at least on some occasions, to the domanial court. The court dealt with the holdings and services of the tenants regarding the same kind of questions as the baronial courts in their sphere, but in doing so it was dealing not with questions of feudal law, that is the law of fiefs, but with customary law, the customs of the manor. The business before the court was largely economic, enforcing the services and payments due the lord. Apart from disputes among the tenants, the chief business was supervising the work of a farming community whose centre was the lord's hall and his domain.

There was also another side to the work of the domanial court. As the franchisal court was one in which the public jurisdiction of the hundred had been merged, so the domanial court was one in which the public jurisdiction of the town had been merged. The manor did not always correspond in area to a town; probably it did so oftener than the franchisal district to a hundred. Apparently the correspondence was so frequent that the town jurisdiction was absorbed throughout the country generally into domanial courts. This appears to have been done also without royal grants. It was too unimportant business for the state to concern itself with it. The civil business of a free town would be petty cases only. All important cases would go to the hundred or county court. The town court was chiefly a local police court dealing with minor offenses only. As the lord became the owner of the town, as certainly in very many cases he did, the court naturally passed with the town into his possession. Nobody had then or later any interest to object. The domanial court was therefore partly a proprietary court and partly a communal court whose proceeds belonged to the lord.

The fields of the three courts which I have described were as distinct as the fields of the contemporary civil and ecclesiastical courts. They were distinct in origin, in content, and in historical fate. In saying this I am leaving out of account the overlapping of jurisdictions, which is a constant feature of medieval courts, by which the same case might be tried either in the town or the hundred court, or in the hundred or the county court, but that fact rests upon a different principle and is not an exception to what is here said. The franchisal court administers the law of the state. Its business is mostly police or criminal, but to some extent civil. The baronial court administers feudal law proper, the law of vassals and fiefs, mostly civil, but with a quasi-criminal side though not touching offenses against the state. The domanial court administers manorial law proper, customary law technically so called,

hofrecht, the law of the domain and the tenures, not military but economic tenures, mostly servile but also many free belonging within the sphere of the manor and its economic interests. All these distinctions were well understood and clearly discriminated by those who were operating these courts, and though they were often careless about them, they always held them strictly apart when they had occasion to do so.

When we take up for study the facts recorded of these courts, there is apparent a confusion in them which seems to cast doubt on these assertions. The key to the confusion is economy and convenience. It was often more convenient and more economical to hold one court in connection with another, or to use one court to do the business of another, than to try to maintain two distinct courts. What was done in any particular case was largely a territorial question. If the lord had a fairly large body of military and independent freehold tenants within a reasonably compact territory, he could hold a separate baronial court. If the situation was particularly favorable, he could have a baronial court meeting in a fixed place, like the honor court of Broughton. If the fiefs that were held of him were badly scattered, he had to do the best he could. There are two things that seem to have been commonly done. One was to move his honor court about from place to place wherever he went himself, as was done by the abbot of St. Edmunds. The other was to hold it in connection with some domanial court for the tenants in its immediate vicinity. As feudalism proper declined and the larger military tenants made themselves free of suit of court, this last expedient became more and more the ruling one, and the court baron, which is the baronial court for a small territory held in connection with a domanial court, became more frequent from about the end of the thirteenth century. What is new at that time, however, is not the court but the name. Courts of this kind had been held earlier, probably from the date of the Conquest. Baronial courts proper were so uncommon in England because compact feudal lordships were uncommon.

The apparent confusion is even greater between franchisal and domanial courts. The entire hundred in the hands of a lord was somewhat, but not much more common than a compact lordship occupied by vassals. There is another reason also for confusion in this case in the similarity of franchisal business to a part of the domanial, the police business. In which court an infringement of the assize of bread and beer should be punished, seems often a matter of indifference. When it was inconvenient to hold a sepa-

rate franchisal court, it was a simple matter to do the business of the franchise in connection with a domanial court. There is still another principle of the time which must enter into the account. While a freeman, common or military, might legally object to having his cases, except purely domanial questions, decided by serfs, the serf could not object to the decision of his cases by freemen. It was easy and correct to use the baronial court as a court for reserved cases from the domanial court, though the evidence that this was actually done is very slight. It was easy to use a court baron to do the business of a domanial court, but on the contrary a court baron could not be held without some free tenants: the domanial court could not do the business of the baronial.

What I venture to suggest is that the work of investigation in this subject will proceed most fruitfully if it be used to test in detail some such theoretical reconstruction as I have attempted above. It is for the purpose of such investigation that it is submitted. In following it as a working scheme, I believe that a part of the confusion, that part at least which is subjective, ought to disappear. It is almost always possible to tell without much difficulty to what jurisdiction the business before the court belongs. It it not always possible to tell exactly what court is acting. The facts as they appear in the rolls seem to imply that the actors were not always careful to see that a change of court in form accompanied a change of business. Usually there was no reason why they should be careful. When there was something at stake, sometimes at least they were careful. There is, however, this much confusion about the facts which probably can never be removed, but there is no reason why we should submit to unnecessary confusion about things that were no doubt extremely simple to contemporaries.

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SOME SOURCES FOR TRACING JOINT RESOLUTIONS OF CONGRESS

THE best place to find action on resolutions is the official journals of the two houses, rather than the *Globe* or the *Record*.

Simple resolutions adopted by the two houses up to August 31, 1842, are printed in the last volume of the congressional documents set for each session. They will also be found in the journals of the two houses.

The text of bills and joint and other resolutions, as introduced into Congress, can, as a rule, be found only in the files of bills and resolutions kept in the Senate Document Room at the Capitol and in the Library of Congress. The Library of Congress file begins with